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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956 ~~1956~~ 1957

No. ~~467~~ 25

MARTIN JIMENEZ,
Petitioner,

vs.

BRUCE BARBER, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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to the United States Court of Appeals for the Ninth Circuit.

Martin Jimenez, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 12, 1956, affirming the dismissal of

the complaint by the District Court and the decision of the Court of Appeals for the Ninth Circuit entered August 30, 1956, denying a petition for hearing en banc and for a rehearing.

CITATION TO OPINIONS BELOW.

The decision of the Court of Appeals on the merits is unreported and is printed in Appendix B hereto, page v. The opinion of the Court of Appeals denying a hearing en banc and denying a petition for rehearing is unreported and is printed in the record at page 28 and in Appendix C, infra, page xi. A prior decision of the Court on a motion for a stay of deportation dated October 13, 1955, is reported at 226 F. 2d 449 and reprinted in Appendix A, infra, page i.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 12, 1956 (R. 27). A timely petition for rehearing and for hearing en banc, filed August 10, 1956, was denied on August 30, 1956 (R. 28). Appendix C, infra. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Is the constitutional prohibition against bills of attainder (Article I, Sec. 9, Clause 3) violated by

a statute which as construed and applied denies suspension of deportation to all deportable aliens who have at any time since their entry into the United States been members of the Communist Party or of the Communist Political Association?

2. May an alien who is deportable by reason of illegal entry, and as to whom there is no accusation of membership in any organization, be required as a condition of eligibility for suspension of deportation, to answer questions regarding his affiliations and associations during the entire period of his stay in the United States?

STATUTES INVOLVED.

The Immigration Act of 1917, as amended by the Act of June 28, 1940, Title 2 (54 Stat. 671):

* * * * * * *

(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has

resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . .

(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U.S.C., title 8, sec. 137), entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes", as amended;

* * * * * * *

The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U.S.C. 137):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary branch, affiliate, or subdivision of any

such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt.

STATEMENT OF THE CASE.

Petitioner Martin Jimenez has resided continuously in the United States since 1928 and is the spouse of an American citizen (R. 3). By an order which became final on March 9, 1954, petitioner was ordered deported from the United States for illegal entry into the United States. During the deportation hearings commenced in 1951 petitioner applied for suspension of deportation under the provisions of the Immigration Act of 1917, as amended, 8 U.S.C. §155. This was denied upon the principal ground that plaintiff was ineligible because he had refused to answer questions asked in the deportation proceedings about his membership in or affiliation with certain organizations, including but not limited to the Communist Political Association and the Communist Party.

Although these questions were asked during the deportation proceeding, there was no charge and no evidence that petitioner had ever belonged to such organizations, and it affirmatively appeared by the statement of the hearing officer at the said deportation hearing that no accusation of membership in any organization was made against petitioner (R. 5, 6).

Petitioner subsequently sought to reopen the record and offered to answer such questions if they related to the five year period during which he was required by the statute to establish his good moral character. This motion was denied by the Board of Immigration Appeals on March 22, 1955, on the ground that plaintiff had failed to establish his eligibility for suspension of deportation (R. 6, 7).

The respondent thereupon sought to imprison and deport the petitioner from the United States, and petitioner filed an action in the District Court for an injunction and declaration of rights. Jurisdiction of the District Court rested upon the provisions of 28 U.S.C. §§1331, 1346(a), 2201, 2202; and upon 5 U.S.C. §1009. The respondent filed a motion and notice of motion to dismiss the complaint (R. 14) which was granted by the District Court (R. 18). Petitioner thereupon appealed to the Court of Appeals for the Ninth Circuit (R. 17). Jurisdiction of the Court of Appeals was conferred by 28 U.S.C. §1294.

On August 26, 1955, petitioner filed a motion and notice of motion in the Court of Appeals for a stay of deportation pending appeal. The motion was argued on September 6, 1955, and was granted on October 13, 1955, by a panel of the Court of Appeals consisting of Chief Judge Denman, and Circuit Judges Orr and Chambers. A per curiam opinion is reprinted, infra, Appendix A, page i.

On Thursday, July 12, 1956, this cause was heard on the merits before Chief Judge Denman, Circuit

Judge Hastie, and District Judge Tolin (R. 22). That panel of the Court of Appeals decided the case on July 12, 1956, affirming the dismissal of the complaint by the District Court. An opinion was written for the Court by Circuit Judge Hastie (R. 23-26; reprinted *infra*, Appendix B, page v.

A timely petition, filed August 10, 1956, sought a rehearing and a hearing en banc. The hearing en banc was sought because the panel of the Court of Appeals which first considered the case on motion for stay of deportation found the case presented constitutional issues of importance, while the panel which decided the case on the merits treated the case as though no constitutional issues were presented. The motion for a rehearing and for a hearing en banc was denied by the panel which had decided the case on the merits on August 30, 1956 (R. 28; Appendix C, *infra*, page xi).

REASONS FOR GRANTING THE WRIT.

1. This case involves a question now pending before this Court. In *Rowoldt v. Perfetto*, certiorari granted 350 U.S. ....., 99 L.Ed. 408, No. 34 on the calendar of this Court for the October Term 1956, this Court will have before it the correctness of its decision in *Galvan v. Press*, 347 U.S. 522. The Court below relied upon *Galvan v. Press* in its decision on the merits (R. 25).

The question involved in *Galvan v. Press* and *Rowoldt v. Perfetto*, which is also involved in this case, is

the question whether Congress may constitutionally impose pains and penalties upon a person in the United States by reason of membership in a named organization, without a judicial trial. In short, the question is whether the statute providing that one may be deported (or denied suspension of deportation) for former membership in the Communist Party is a bill of attainder.

That issue is necessarily involved in the case at bar because the question asked at the deportation hearing, whether the petitioner here had been a member of the Communist Party or of the Communist Political Association was relevant and material only because the statute provided that persons who were deportable as members of those organizations were not eligible for suspension of deportation. Since the statute provided that any person who had at any time been a member of such organizations *is deportable by reason of that membership,* the statute in effect provides that any person who has been a member of the Communist Party or the Communist Political Association is ineligible for suspension of deportation.

That *Galvan v. Press* was not a square holding on the bill of attainder point was apparently recognized by the Court below. In the opinion of that Court on a motion for stay of deportation, it was expressly recognized that *Galvan v. Press* does not decide the question whether the statute is a bill of attainder. In the decision on the merits (R. 25), the Court says:

> "But in any event such questions were relevant and were within the legitimate area of inquiry in

such a case as this. *Cf. Galvan v. Press*, 1954, 347 U.S. . . ."

In the *Galvan* case this Court did not pass upon the question whether the statute was a bill of attainder, nor has it passed upon that question in any reported decision. The question has been urged before this Court on numerous occasions beginning at least with *Heikkila v. Barber*, 345 U.S. 229. That case went off on a procedural question. In *Garcia v. Landon*, 99 L.Ed. 48, this Court had granted certiorari but the Government prevented the question from being reached by withdrawing its deportation action. In *Rowoldt v. Perfetto* the question was again squarely presented and is now before the Court.

While the court below considered the proposition that questions regarding membership in the Communist Party or the Communist Political Association might be relevant to the question of good moral character, it is clear that the statute on its face makes petitioner ineligible for suspension of deportation if he was at any time a member of the Communist Party. The court below relied upon this construction of the statute citing *Galvan v. Press*, supra. *Galvan* says nothing about good moral character, but holds that deportation for past Communist Party membership does not violate the constitutional ban on *ex post facto* laws.

2. The decision of the court below conflicts in principle with the decision of this Court in *Wieman v. Updegraff*, 344 U.S. 183. In the *Wieman* case this Court held that it was unconstitutional for a state to

require applicants for the privilege of employment as schoolteachers to state under oath whether they had been members of the Communist Party, where the circumstances indicated that no requirement of knowledge of the aims and purposes of the Communist Party was implied in the oath requirement. This Court held that where *"membership alone penalizes"*, the constitutional protections afforded all persons in the United States are violated.

In the case at bar the statute is read, as indeed its plain meaning requires it to be read, as denying suspension of deportation to any person who has in the past been a member of the Communist Party or the Communist Political Association. No requirement of *scienter* of the purposes and aims of those organizations is either implicit or explicit in the statute.

The privilege of remaining in the United States after 28 years of residence here is certainly not less to be preferred than the privilege of government employment as a teacher. No distinction exists therefore between the petitioners in *Wieman v. Updegraff* and the petitioner in the case at bar, at least as to the importance of the right or privilege whose protection is sought at the hands of this Court.

3. The decision below conflicts in principle with the decisions of several state courts of last resort. Three state supreme courts have considered the constitutionality of the so-called "Gwinn Amendment" to the Independent Offices Appropriations Act of 1953, Public Law 455, 82nd Congress, 66 Stat. 403, 42 USC §1411(c). That amendment provided that no housing

unit constructed with federal funds should be occupied by a person who is a member of an organization designated as subversive by the Attorney General of the United States. Various local housing authorities sought to implement this statute by requiring the taking of an oath by tenants of federally supported housing projects that they were not members of any organization on the Attorney General's list.

Those cases construing the Gwinn Amendment involved the privilege of remaining in federally supported housing projects, as to which there is no vested right or any right. The privilege was withheld by the housing authorities involved because of refusal to take the oath and supply the information requested about membership in named organizations. The case at bar is an even stronger one since petitioner here had a statutory right to have his application for suspension considered by the Attorney General. Those cases are strong authority for petitioner in the case at bar where the privilege of suspension of deportation is sought, and the right to apply for it is denied because the petitioner refuses to testify under oath about membership in certain named organizations.

In *Lawson, Jr., et al. v. Housing Authority of the City of Milwaukee,* 270 Wis. 269, 70 N.W. 2d 605, cert. den. 350 U.S. 882, the Supreme Court of Wisconsin considered the constitutionality of the Gwinn Amendment. That Court squarely held that the resolution was unconstitutional and void because it violated the provisions of the First Amendment. The Court cited *Frost & Frost Trucking Co. v. Railroad Commission,*

271 U.S. 583, 47 ALR 457, and *Hannegan v. Esquire Inc.*, 327 U.S. 146. It quoted from the last named case at p. 156, where this Court said:

> "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 421-423, 430-432, 437, 438, 41 S.Ct. 352, 357, 358, 360, 361, 363, 65 L.Ed. 704. *Under that view the second-class rate could be granted on condition that certain economic or political ideas* not be disseminated. (Italics supplied.)"

In *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522, the Supreme Court of Illinois reached the same conclusion as the Supreme Court of Wisconsin. The question was raised whether the oath required of the tenants of federally supported housing projects by the Chicago Housing Authority, under the Gwinn Amendment, was constitutional. The Housing Authority pointed out that they could evict tenants who refused to sign the oath by giving them a 15-day notice to quit. The Court said:

> "The argument, in other words, is that because the tenants have no legal right to occupy the housing accommodations, they cannot be deprived of any constitutional right by the requirements in question. The position is untenable. A similar contention was rejected in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 219, 97 L.Ed. 216; where State employees were required by statute

to take an oath concerning their affiliation with certain proscribed organizations, as a condition of continued employment. The court held that statute invalid . . .

A like conclusion must follow in the present case. Even though appellants have no right to remain as tenants of appellee, they may not, as a condition of continued occupancy, be required to comply with unconstitutional requirements."

See also:

Kutcher v. Newark Housing Authority, 20 N.J. 181, 24 Law. Week. 2275,

and

Rudder v. United States (C.A. D.C.), 226 F.2d 51.

4. The question involved in this case—proscription of membership in an organization by legislative fiat—is a question of importance in the administration of the law generally, and particularly in the administration of the immigration laws. Actions are now under way in several southern states for the legislative outlawing of the National Association for the Advancement of Colored People, an organization actively engaged in fighting against racial segregation in public schools and elsewhere. In the immigration law, the present statute in 8 U.S.C. § 1251(a)(C) provides for the deportation of aliens who are members of or affiliated with the Communist Party or the Communist Political Association.

Thus the fact that the particular statute under which petitioner in this case seeks suspension of de-

portation has been repealed, does not mean that the question will not again be before the government and the Courts. The petitioner's brief in *Rowoldt v. Perfetto*, No. 34 this Term, illustrates with great clarity the large amount of activity in the field of deportation for prior or present membership in the Communist Party.

In the public discussion and the sometimes violent action that is now taking place about the question of racial integration in public schools in the southern states of the United States, the device of a bill of attainder is being turned to by several of the states. The organization against which these moves are directed is the National Association for the Advancement of Colored People.

There is now pending before the District Court for the Eastern District of South Carolina, Charleston Division, in action No. 5792, *Bryan, et al. v. Austin, et al.*, a suit for an injunction in which a three-judge Court has been appointed. The action seeks a declaration that a South Carolina statute, Act of 1956, No. 741, is unconstitutional on its face and as applied, and an injunction against the refusal to continue in employment schoolteachers who refuse to state to the school authorities whether they are or have been members of the National Association for the Advancement of Colored People. Other relief also sought in that action is an injunction against the use of an application for employment as a teacher which embodies a questionnaire devoted almost solely to the applicant's membership in or support of the National Association

for the Advancement of Colored People and the applicant's attitude toward racial integration in the school system. That case, which may be expected to come before this Court on appeal in the very near future, raises the same question as the case at bar. The fact that the organization there involved is not the Communist Party, but an organization widely respected at least in the northern part of the United States, demonstrates with textbook clarity the well-recognized rule that repressive legislation if accepted by the Courts when directed against the most despised minority is then available for use against other groups. Further, it demonstrates that the question raised by this case is a live, important and recurring question which requires a decision by this Court to finally determine it.

5. The decision of the Court below on the merits conflicts with an earlier decision of the same Court in this case. On a motion for a stay of deportation one panel of the Court of Appeals below found the case involved important questions of constitutional law, not decided by this Court (Appendix A, *infra*). The decision on the merits, by another panel of the same Court, reprinted *infra* Appendix B, contains no explicit recognition of any constitutional law questions whatever, and rules as though the decision of this Court in *Galvan v. Press* were a precedent in point. The first panel which passed on the case found that the question here involved has not been decided by this Court in *Galvan v. Press*. Following the decision of the second panel, a petition for a hearing en banc

and for a rehearing was denied, leaving the law in this circuit in doubt.

Where the question involved is one of such great importance to the administration of the immigration laws (a field of frequent litigation in the Ninth Circuit) and a question of constitutional law of such general importance as the question involved in the case at bar, this Court should grant certiorari to terminate the uncertainty of the law in this circuit, or remand the case for hearing before the entire Ninth Circuit Court. *Cf. United States ex rel. Robinson v. Johnston*, 316 U.S. 649.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 26, 1956.

Respectfully submitted,
LLOYD E. MCMURRAY,
Attorney for Petitioner.

MCMURRAY, BROTSKY, WALKER,
BANCROFT & TEPPER,
Of Counsel.

(Appendices Follow.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Martin Jimenez, Appellant, vs. Bruce Barber, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, Appellee.	Undocketed Oct. 13, 1955

Motion for Stay of Deportation

Before: Denman, Chief Judge, and ORR and CHAMBERS, Circuit Judges.

Per Curiam:

Martin Jimenez appeals from a decision of the United States District Court for the Northern District of California in a suit for a declaratory judgment holding, in accord with the Attorney General's decision, that he is not eligible to be considered for a suspension of deportation under 8 U.S.C. § 155[1] (now

[1] § 155 (c) provided: "In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien. . . ."

superseded by 8 U.S.C. § 1254). He seeks a stay of his deportation pending his appeal. We think that Jimenez has presented a substantial question for appeal and that the deportation should be stayed.

Jimenez alleges that he was held ineligible to apply for suspension of deportation because of his refusal to answer questions about his memberships, associations and beliefs *before* the five year period for which he had established good moral character under § 155. He contends that this procedure violated the guarantees of the First Amendment, and Article I, Section 9, Clause 3 (the Bill of Attainder clause) of the Constitution. Where governmental action effects an "indirect, conditional, partial abridgment" of free speech, that is, where one must give up a right or privilege as the cost of entertaining a belief, the Supreme Court has indicated each case rests on its own facts tested by a balance of the nature of the governmental interest against the degree of invasion of free speech. See American Communications Ass'n., CIO v. Douds, 339 U.S. 382, 393, 399 (1950). The Supreme Court recently declined to decide the issue of the constitutionality of basing governmental action on memberships and associations. See Peters v. Hobby, 349 U.S. 331 (1955). We do not understand that Galvan v. Press, 347 U.S. 522 (1954) is necessarily decisive of the issue in this case. Likewise the scope of the bill of attainder clause is unclear as applied to the taking away of a right or privilege because of beliefs, memberships or associations. *Compare,* American Communications Ass'n., CIO v. Douds, supra; Garner v.

Board of Public Works of Los Angeles, 341 U.S. 716 (1951) *with* United States v. Lovett, 328 U.S. 303 (1946). These are questions worth argument.

The United States contends that these questions will never be reached since (a) the declaratory judgment action is not appropriate here, and (b) Jimenez failed to join the Attorney General of the United States, an indispensable party. To the first contention we cite McGrath v. Kristensen, 340 U.S. 162 (1950) holding that a declaratory judgment may be brought in a case such as this. The failure to join the Attorney General itself presents a substantial question: If the court resolved the substantive issue in favor of Jimenez, could it issue an effective order against the District Director of Immigration alone? This court has not ruled on whether the Attorney General is an indispensable party to an action such as this one.[2] At this point in the proceeding it would appear that the controversy is between Jimenez and the District Director.[3] Whether a suit must be brought against a superior governmental official or whether it may be brought against a local representative is a question of practicality hinging on whether the court can issue an effective order without jurisdiction over the superior. See Shaughnessy v. Pedreiro, 349 U.S. 48,

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[2]This court has expressly declined to rule on the question. Rodriquez v. Landon, 212 F. 2d 508, 509, n. 6 (Cir. 9, 1954). The cases of Diaz-Montero v. Brownell, 217 F. 2d 737 (Cir. 9, 1954) and Chavez v. McGranery, 220 F. 2d 857 (Cir. 9) do not decide this question.

[3]Apparently the exercise of discretion to suspend deportation was carried out by the District Director of Immigration and Naturalization. See 8 C.F.R. § 150.10 (1949 edition).

52-54 (1955); Williams v. Fanning, 332 U.S. 490 (1947).

It is difficult to see how allowing Jimenez to appeal this case would prejudice the interests of the United States. He has resided here since 1928. The warrant for his deportation was issued in 1940 but the Immigration Service did not choose to enforce it by arresting him until 1951.

Jimenez's deportation is ordered stayed until the further order of this court.

(Endorsed:) Per Curiam Opinion. Filed Oct. 13, 1955. Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Martin Jimenez, Appellant, vs. Bruce Barber, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, Appellee.	No. 14,923 July 12, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, Chief Judge, and HASTIE, Circuit Judge, and TOLIN, District Judge.

HASTIE, Circuit Judge

Appellant Martin Jimenez is an alien. He filed his complaint in the district court for injunctive and declaratory relief challenging the action of a District Director of the Immigration and Naturalization Service in taking him into custody for deportation. The complaint concedes that there is lawful basis for appellant's deportation but asserts that the Attorney General has improperly disposed of his application for suspension of deportation under Section 19(c) of

the Immigration Act of 1917, as amended.[1] More particularly, Jimenez alleges that the Attorney General granted him a hearing on his application for suspension of deportation but denied relief because of his "refusal to answer questions asked before the hearing officer . . . about his membership or affiliation with certain organizations, including but not limited to the Communist Political Association and the Communist Party." The District Director moved to dismiss the complaint, arguing both that the Attorney General was an indispensable party and that the complaint did not state a cause of action. That motion was granted and this appeal followed.

In the light of *Shaughnessy v. Pedreiro*, 1955, 349 U.S. 48, we have concluded that the Attorney General was not a necessary party. True, the complaint put into issue the propriety of the handling of the petition for suspension of deportation by the Attorney General or his duly designated representatives. But, technically, the redress sought was relief from action taken and proposed by the defendant District Director to deport appellant. Here, as in the *Shaughnessy* case, 349 U.S. at 53, "undoubtedly the Government's defense can be adequately presented by the District Director", who himself is the chief area representative of the bureau which administers immigration matters under supervision of the Attorney General. And

[1] 62 Stat. 1206, 8 U.S.C. § 155, repealed by § 403(a) of the Immigration and Nationality Act of 1952, 66 Stat. 279. However, a saving clause, § 405(a), 8 U.S.C.A. § 1101 Historical Note, prevented the repealer from affecting applications like the present one which had been filed before the effective date of the repealer.

though no order in this case would run against the Attorney General himself, again quoting the *Shaughnessy* opinion at page 53, "we cannot assume that a decision on the merits in a court of appeals on a question of this kind . . . would be lightly disregarded" by the responsible head of the Department concerned.

But, quite apart from this question of parties, we are satisfied that the complaint does not state a cause of action. Section 19(a) of the Immigration Act of 1917, as amended, authorizes the Attorney General, within his discretion in certain hardship cases, to suspend the deportation of a deportable alien who has been residing in the United States for seven years and "has proved of good moral character for the preceding five years." If the suspension is for more than six months the Attorney General must submit a report on the case to Congress, and approval by Congress is required for continuation of the suspension of deportation. In this case it appears that when a warrant was issued on sufficient grounds for appellant's apprehension and deportation, he sought to invoke the Attorney General's discretion under Section 19(a) and was granted a hearing. But his present complaint asserts that at that hearing he "refus[ed] to answer questions asked before the hearing officer in the deportation proceedings about his membership in or affiliation with certain organizations, including but not limited to the Communist Political Association and the Communist Party." And for that reason, he asserts, the Attorney General denied the requested relief. We are asked to hold that such action by the

Attorney General was an improper refusal to consider the application on its merits and to exercise the discretion vested in him.

We find no impropriety in the Attorney General's action. The answers to the questions might or might not have aided in judgment of the applicant's character and whether discretionary relief should have been afforded him. But in any event such questions were relevant and were within the legitimate area of inquiry in such a case as this. *Cf. Galvan v. Press,* 1954, 347 U.S. 522; *Garcia v. Landon,* 9 Cir. 1953, 207 F.2d 693. We cannot characterize as arbitrary an administrative conclusion that the very failure of the applicant to cooperate in this relevant inquiry in itself justified a refusal to treat him as deserving of discretionary relief from normal liability to deportation. *Cf. Bilokumsky v. Tod,* 1923, 263 U.S. 149; *Hyun v. Landon,* 9 Cir. 1955, 219 F.2d 404. Rather, the administrative decision reflected a permissible exercise of discretion Congress has vested in the Attorney General for the disposition of such cases. *Cf. Barreiro v. Brownell,* 9 Cir. 1954, 215 F.2d 585; *United States ex rel. Kaloudis v. Shaughnessy,* 2 Cir. 1950, 180 F.2d 489.

Appellant makes one other point. Some time after this administrative ruling against him, he asked that his application be reconsidered, asserting that he then was willing to answer questions concerning his organizational affiliations during the preceding five years. The Attorney General refused to reopen the proceeding and appellant says this was arbitrary.

But, all other considerations aside, it is clear that appellant was still not agreeing to cooperate fully in the inquiry he himself was asking the Attorney General to make. While the statute spoke of "good moral character for the preceding five years", behavior before the beginning of that five year period might well have afforded some basis for inference concerning his character as it existed during the statutory period. It might also have had bearing upon the credibility of other testimony directly asserting what kind of person applicant was during the five year period. We think the Attorney General acted quite within his discretion in refusing to consider a second time the application of one who at first would tell nothing of his recent associations and later offered only to tell so much as he thought the authorities ought to know.

For these reasons, the judgment is affirmed.

(Endorsed:) Opinion. Filed, July 12, 1956,
Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals for the Ninth Circuit

Martin Jimenez, Appellant, vs. Bruce Barber, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, Appellee.	No. 14,923

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Filed: July 12, 1956
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, August 30, 1956

Before: DENMAN, Chief Judge, HASTIE, Circuit Judge, and TOLIN, District Judge.

Order Denying Petition for Rehearing and Hearing En Banc

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed August 10, 1956, and within time allowed therefor by rule of Court for a rehearing and hearing en banc of the above-entitled cause be, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 467

MARTIN JIMINEZ, PETITIONER

v.

BRUCE BARBER, District Director of the Immigration and Naturalization Service, Thirteenth Immigration District

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B, pp. v-ix) is reported at 235 F. 2d 922. The opinion on the Motion for Stay of Deportation appears as Appendix A to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (Pet. App. C, p. x).[1] A petition for a

[1] The petition erroneously states (Pet. 6-7) that the case was argued on July 12, 1956, and decided the same day. The record shows (R. 21-22) that it was argued and submitted on July 9th and decided on July 12th.

rehearing *en banc* was denied on August 10, 1956 (Pet. App. C, p. xi). The petition for a writ of certiorari was filed September 28, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, acting for the Attorney General, improperly denied petitioner's application for suspension of deportation after he refused to answer questions as to his membership in the Communist Party.

2. Whether the constitutional bar on bills of attainder is contravened by the Immigration Act of 1917, as amended, which gave deportable aliens who met certain conditions the right to apply for suspension of deportation and prescribed as one condition that the alien shall not have been deportable for membership in the Communist Party.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended by the Act of July 1, 1948, 62 Stat. 1206, provided in partinent part:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would

result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such pro-

ceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U.S.C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided,* That no quota shall be reduced by more than 50 per centum in any fiscal year.

Section 19(d) of the Immigration Act of 1917, as amended by the Act of June 28, 1940, 54 Stat. 672, provided in pertinent part:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U.S.C., title 8, sec. 137), entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *

The Act of October 16, 1918, as amended by the Act of September 23, 1950, 64 Stat. 1006, 1008, provided in pertinent part:

> Sec. 1. * * *
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> (A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

* * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 * * * (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

This declaratory judgment action was instituted by petitioner in the District Court for the Northern Dis-

trict of California to challenge the denial of his application for suspension of deportation (R. 3-11). The government's motion to dismiss the complaint was granted by the District Court (R. 18); this action was affirmed on appeal (R. 27).

Petitioner is a citizen of Mexico who has been ordered deported on the ground of illegal entry (R. 3, 5), a ground he does not here contest. At his deportation hearing, petitioner applied for the privilege of suspension of deportation under Section 19 of the Immigration Act of 1917, as amended (*supra*, pp. 2-4)[2] (R. 4). Section 19 (d) of that Act proscribed suspension in the case of aliens deportable under the Act of October 16, 1918, as amended (*supra*, p. 4), which made membership in the Communist Party or the Communist Political Association at any time a specific ground for deportation (*supra*, pp. 4-5). When questioned by the examining officer as to his membership in these organizations, petitioner declined to answer, and, principally on this ground, the hearing officer denied his application for suspension of deportation (R. 5).

The Board of Immigration Appeals, whose opinion is set forth in the Appendix (*infra*, pp. 12-18), approved the decision of the hearing officer, noting that the burden of establishing eligibility for relief was on the applicant (App., *infra*, p. 16). As an additional ground for denying the application, the Board cited petitioner's moral conduct, in that he had lived for twenty-three years with a woman as man and wife and

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[2] The repeal of the 1917 Act by Section 403(a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 8 U.S.C. 155, was made inapplicable as to pending applications for suspension, as here, by the savings clause of the 1952 Act. Section 405 (a), 66 Stat. 280, 8 U.S.C. 1101, Historical Note.

did not marry her until six days prior to his deportation hearing (App. *infra*, pp. 16-17).

On March 22, 1955, the Board of Immigration Appeals denied petitioner's request to reopen his case; petitioner's request alleged that he would answer questions as to his membership in organizations during the limited time of the preceding five years (R. 6).

The court below, in affirming the dismissal of petitioner's declaratory judgment action, held that the inquiry as to membership was relevant, and declined to characterize as arbitrary the administrative conclusion that petitioner's failure to cooperate at his hearing justified a refusal to treat him as deserving of discretionary relief (Pet. App. B, p. viii). The court further found no abuse of discretion in the refusal to reopen the proceedings, in view of petitioner's limitation on his offer to testify (Pet., App. B, p. ix).

ARGUMENT

1. The Immigration Act of 1917, as amended, in providing for suspension of deportation, made ineligible for such relief aliens who were deportable for having been members *at any time* of certain subversive organizations, and left the decision as to who among qualified applicants should be granted the ultimate relief to the "unfettered discretion" of the Attorney General. *Jay* v. *Boyd*, 351 U.S. 345, 357-358.[3] The granting of the relief of suspension of deportation has been likened by this Court in *Jay* to the pardoning and

[3] Under the present statute, aliens deportable for membership in the Communist Party are not wholly ineligible for suspension. They may be considered for relief if they can prove ten years of continuous residence, good moral character for that time, and exceptional hardship. Section 244(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 215, 8 U.S.C. (a)1254.

parole powers in which relief comes "as an act of grace." 351 U.S. at 354. The Attorney General has delegated his authority in this matter to special inquiry officers, with review by the Board of Immigration Appeals, and has placed the burden of proving eligibility for the relief upon the applicant. 8 C.F.R. (1951 Cum. Supp.) 151.3(e).[4]

Since eligibility under the 1917 statute (as amended) depended upon whether petitioner was within the proscribed class of aliens (*supra*, p. 4), the relevance of the questions he declined to answer is apparent; and his refusal means not only that he failed to meet his burden of proving eligibility, but also that he could properly be found not eligible in fact since silence when called upon to speak has been held to be evidence of the most persuasive nature against an alien. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-154. On this ground alone, the denial of petitioner's application was both reasonable and unavoidable under the statutory terms.

Moreover, even assuming petitioner's *eligibility* for discretionary relief, the denial in his case was neither arbitrary nor unreasonable. An applicant for suspension of deportation seeks a privilege, not a right (*Jay* v. *Boyd*, 351 U.S. at 354), and one who asks for clemency should make a full and frank disclosure of his background. Questions aimed at developing petitioner's past loyalty are certainly relevant in deciding whether the further hospitality of this country should be extended to him. They are also relevant in determining whether he is worthy of such special relief, in view of the fact that the 1917 Act (as amended) (*supra*, pp. 3-4), as well as the superseding Immigration and

[4] Now 8 C.F.R. (1952 Rev.) 242.54(d). See *Jay* v. *Boyd*, 351 U.S. 345, 351.

Nationality Act of 1952,[5] provide that ultimate cancellation of petitioner's deportation means that the quota list of his country is reduced by one, in derogation of the rights of his countrymen who may be waiting their turn on the list.

Added to these bases for denying suspension as a discretionary matter is petitioner's moral conduct, which was given as a specific ground by the Board of Immigration Appeals for refusing to grant his application (App. *infra*, pp. 16-17). It cannot be said as a judicial matter that this ground did not warrant denial of the privilege of suspension under a statute which places no limits on the exercise of the discretion of the Attorney General or those acting for him. Since there was thus no abuse of discretion by the administrative authorities, there is no occasion for judicial intervention. *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372 (C.A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490 (C.A. 2).

2. Legislation denying the privilege of suspension of deportation to an alien on the basis of membership in Communist organizations is clearly not a bill of attainder. On this issue we need go no further than the Court's decision in *Galvan* v. *Press*, 347 U.S. 522, which upheld the constitutionality of the Internal Security Act of 1950, making past membership in such organizations a specific ground for deportation, in spite of a full dress argument that it constituted a bill of attainder. See the Brief for Petitioner, No. 407, O. T. 1953, pp. 53-55. The general principles enunciated in *Galvan* have recently been reaffirmed by the Court in *Marcello* v.

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[5] Section 244(d) of the Immigration and Nationality Act of 1952, 66 Stat. 216, 8 U.S.C. 1254(d).

Bonds, 349 U.S. 302, 314; and see *Jay* v. *Boyd*, 351 U.S. 345, 348.[6]

Since it is constitutional to order deportation on the basis of membership in a Communist group, *a fortiori* the privilege of suspension of deportation can be made to hinge upon that basis. Regardless of the validity of the deportation statute itself, it is reasonable to make the grant of this special privilege (which, as noted above, results in diminution of a quota) dependent on a showing that the alien has never been a member of an organization which Congress has found to be hostile to the interests of the United States. In *Jay* v. *Boyd*, 351 U.S. at 359, the Court explained that the constitutional protections which surround an alien in a deportation procedure do not *ipso facto* apply to him when he is seeking suspension of deportation, "in view of the gratuitous nature of the relief."

The statutes cited by petitioner as having been held to be bills of attainder (Pet. 9-13) are not pertinent; none of them involves the deportation of aliens. Numerous cases in this Court have held that, for constitutional purposes, deportation is not punishment, but a refusal by the Government to harbor persons whom it does not want. See *e. g.*, *Galvan* v. *Press*, 347 U.S. 522, 531; *Carlson* v. *Landon*, 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595. Since punishment is an integral part of any definition of a bill of attainder (*United States* v. *Lovett*, 328 U.S. 303, 315, 321-4), a statute involving the deportation of aliens cannot fall into that class.[7]

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[6] An attempt to reargue this issue has been made in *Rowoldt* v. *Perfetto*, now pending on certiorari, No. 34, this Term.

[7] See Brief for Respondent in *Galvan* v. *Press*, No. 407, O.T. 1953, pp. 63-66, for detailed discussion on this point.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

NOVEMBER 1956.

APPENDIX

OPINION OF THE BOARD OF IMMIGRATION APPEALS

MARCH 9, 1954

A-4481909—San Francisco

MARTIN JIMENEZ or JOSE MERAZ JIMENEZ or JOSE MARTIN JIMENEZ

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Blanch Freedman, Esquire, 220 Broadway, New York 7, New York. (Heard: January 6, 1953); and Lloyd McMurray, Esquire, 240 Montgomery Street, San Francisco, California.

CHARGES:

Warrant: Act of 1924—No immigration visa.

Lodged: None.

APPLICATION: Suspension of deportation or voluntary departure in the alternative.

DETENTION STATUS: Released under bond.

Respondent has appealed from the decision and order of the hearing officer entered on August 14, 1952, finding him deportable on the charge stated in the warrant of arrest, denying his applications for suspension of deportation, and ordering his deportation from the United States pursuant to law.

This record relates to a 52-year-old married male, a native and citizen of Mexico, who last entered the United States at Calexico, California, on December 31, 1928, at which time he was coming to seek employment and was not in possession of a valid immigration visa.

He has never been admitted to the United States for permanent residence. The finding and conclusion that he is deportable from the United States on the charge stated in the warrant of arrest is sustained by the evidence of record.

During the course of the hearing in deportation proceedings, counsel for respondent first made application for suspension of deportation and, in the alternative, voluntary departure. He then withdrew the request for voluntary departure, leaving only the application for suspension of deportation pending.

The record establishes that the respondent had previously entered the United States in 1917 as an alien laborer. He remained in the United States until 1925, at which time he departed to Mexico, and thereafter reentered the United States illegally about two months later. He was taken into custody by immigration authorities on February 17, 1927, and after a hearing conducted on the same date, deportation to Mexico was effected on March 12, 1927.

The respondent has resided continuously in the United States since his last entry on December 31, 1928. He was married on January 4, 1952 to a woman with whom he had been living since 1929. He testified that he had supported the woman's three children from 1929 until they were married, as well as the woman who is now his wife. He stated that his wife is not in good health and is completely dependent upon him for her support. However, evidence of record (testimony of respondent's spouse) indicates that she has never obtained a divorce from her previous husband who, it appears, deserted her at some time prior to 1929.

During the course of the hearing, the examining officer attempted to question the alien to elicit information from him regarding the alien's affiliation with organizations which might have established the basis for

lodging an additional charge of deportability. Upon advice of counsel, respondent refused to answer any and all questions regarding his membership in or affiliation with certain subversive organizations, namely, the Communist Political Association and the Communist Party of the United States, on the ground of immateriality.

The hearing officer, in his decision and order denying the respondent discretionary relief, stated: "To be statutorily eligible for the grant of either of these privileges (suspension of deportation or voluntary departure), the respondent must be not deportable on any of the grounds specified in Section 19(d) of the 1917 Act. (8 U. S. C. 155). The Act of October 16, 1918, as amended, (8 U. S. C. 137) mentioned in Section 19(d), *supra*, provides for, *inter alia*, the deportation of any alien, who was at the time of entering the United States, or has been at any time thereafter, a member of, or affiliated with the Communist Party of the United States or the Communist Political Association. . . . In view of the respondent's refusal to answer questions material to the issue of his eligibility for discretionary relief, thereby foreclosing the Government from making proper inquiry in the premises, I must perforce deny his application for any form of discretionary relief and order his deportation".

On appeal to this Board, counsel in oral argument has requested that in addition to the brief filed by local counsel in behalf of respondent, oral argument made by appearing counsel in the *Matter of S-*, A-4498284, orally argued on the same date as the instant case, be considered in connection with the determination of this case. In *Matter of S-*, the alien's application for suspension of deportation was also rejected by the hearing officer because of the alien's refusal to answer questions as to whether he had at any time been a member

of the Communist Party or any other organizations on the Attorney General's list of subversive organizations. His refusal in that case was also based on the ground that such questions were immaterial and not germane to the issues before the hearing officer. Counsel argued that as a matter of law such questions were not within the scope of the issue of good moral character which an alien must establish as a basis for eligibility for suspension of deportation. Counsel further contended that Section 22 of the Internal Security Act, amending the Act of October 16, 1918 entitled "an Act to exclude and expel from the United States aliens who are members of the anarchist, and similar classes" is unconstitutional, and therefore the propounding of questions regarding membership in the organizations proscribed by Section 22 of the Internal Security Act was improper and immaterial to an adjudication of eligibility for suspension of deportation. We dismissed the appeal in that case without ruling upon counsel's contentions regarding constitutionality of Section 22 of the Internal Security Act.

Local counsel has also asserted in his brief that the provisions of Section 22 of the Internal Security Act amending the Act of 1918 are unconstitutional as a bill of attainder or a bill of pains and penalties, and as an *ex post facto* law. We shall not rule upon the constitutional questions presented by counsel's assertions in the instant case, as it is not within the province of this Board to pass upon the constitutionality of statutes enacted by Congress. In the *Matter of H-*, III I&N Dec. 411, at 456.

The decision and order of the hearing officer basing the denial of the respondent's application for suspension of deportation upon the alien's refusal to answer questions regarding membership in or affiliation with certain subversive organizations, is hereby approved.

As stated by the hearing officer, the privileges of suspension of deportation or voluntary departure under the Immigration Act of 1917, as amended, may not be extended to any alien who is deportable on any of the grounds specified in Section 19(d) of the Act. The alien must, to establish eligibility for consideration of such relief, affirmatively show that he is not within any of the classes proscribed from the grant of such relief by Section 19(d), as the burden of establishing that he meets the statutory requirements for such relief rests upon the alien (8 C.F.R. §151.3(e)). The hearing officer was under a duty to determine the alien's eligibility for discretionary relief on the basis of all the evidence before him, and he committed no error in considering the alien's refusal to answer questions in determining whether or not discretionary relief should be granted, and in such consideration, in "drawing an inference from the silence of one who is called upon to speak." *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, at 154 (1923); *Circella* v. *Neelly*, 115 F. Supp. 615 (N. D. Ill., 1953).

We here note that there are other unfavorable factors present in this case, established by evidence of record, which warrant denial of discretionary relief, and which we here add as grounds for such denial in approving the decision and order of the hearing officer. The respondent has lived with a woman for a period of twenty-three years who, the record indicates, is legally married to another. The record further reflects that no effort was made to legalize the relationship until six days prior to hearing in deportation proceedings, when they entered into a ceremonial marriage. The record does not affirmatively show that such marriage is a valid one. We therefore conclude that suspension of deportation, had respondent established that he is not within the classes of aliens proscribed from receiving such relief by the terms of Section 19(d) of

the Immigration Act of 1917, as amended, is not warranted as a matter of administrative discretion.

Local counsel for respondent has filed a lengthy brief alleging mainly that the hearing in the respondent's case was in violation of due process of law in that it was not conducted in accordance with the Administrative Procedure Act; that the section of the Supplemental Appropriations Act exempting deportation proceedings from the provisions of the Administrative Procedure Act is unconstitutional and void because it denies to the alien that due process of law which the Act was designed to secure and which was discussed by the Supreme Court of the United States in *Wong Yang Sung* v. *McGrath* (339 U. S. 33 (1950)), and that the examining officer's efforts to elicit information regarding the alien's membership in and affiliation with subversive organizations was improper because no charge had been lodged against the alien regarding deportability under the Act of 1918, as amended, nor was any such charge stated in the warrant of arrest.

Counsel's arguments are without merit. The courts have decided that the provision contained in the Supplemental Appropriations Act of 1950 is constitutional (*Belizaro* v. *Zimmerman*, 200 F. (2d) 282 (C. A. 3, 1952), and have further stated that the provisions of the Administrative Procedure Act do not provide the sole means of affording due process of law under the Constitution and laws of the United States (*United States ex rel Marcello* v. *Ahrens*, 113 F. Supp. 22 (E. D. La., 1953)).

The hearing in the instant case was conducted in accordance with the law and regulations in effect at time of hearing, the alien was represented by counsel, was advised that he could be granted a continuance to prepare a defense for any charge which might be lodged against him during the hearing, and in fact counsel requested and was granted continuance from date of

opening of hearing on January 10, 1952, to February 25, 1952, and from the latter date to June 5, 1952 in order to present his evidence in support of the application for discretionary relief. Careful examination of the entire record reveals no failure of the examining officer or the hearing officer to conduct the hearing in accordance with the applicable regulations. Such regulations are binding on the government, as well as the alien, and constitute for aliens in deportation proceedings that due process of law guaranteed by the federal Constitution to all persons within the borders of the United States. *Ex parte Radivoeff*, 278 Fed. 227 (D. C. Mont., 1922); *U. S. ex rel. Marcello* v. *Ahrens, supra.*

Counsel has cited in support of his arguments numerous cases. We have examined those cases, and find that those involving deportation proceedings are not in point here.

We have carefully considered other points raised by counsel in his brief, and find them likewise without merit.

The order of the hearing officer denying the alien discretionary relief is hereby approved, and the appeal will therefore be dismissed.

ORDER: It is ordered that the appeal be, and the same is hereby, dismissed.